Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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General Application Principles

POLICY STATEMENTS

Seventh Circuit holds that district courts "must follow policy statements unless they contradict a statute or the Guidelines." Defendant's five-year term of supervised release was revoked for drug possession. Under 18 U.S.C. § 3583(g), he was subject to a prison term of not less than 20 months. Under the Guidelines he was subject to a 12–18 month term, or 20 months in light of the mandatory term under § 3583(g). *See* §§ 7B1.3, 7B1.4(a) & (b)(2), p.s. The government argued that the Chapter Seven policy state-ments were merely advisory, not binding. The district court agreed and sentenced defendant to 36 months.

The appellate court remanded: "Both parties agree that the correct interpretation of this policy statement leads to the conclusion that the district court must sentence Lewis to 20 months imprisonment—no more and no less. . . . While we may have been previously inclined to accept the proposition that policy statements are merely advisory, . . . this view has been explicitly rejected by . . . *Stinson v. U.S.*, 113 S. Ct. 1913 (1993). In reaching its holding that sentencing guideline com-mentary is binding, unless contrary to statute or the Guidelines themselves, the Court [stated]: 'The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements.' *Id.* at 1917." Therefore, "we are compelled to hold that the district court erred by not sentencing Lewis to 20 months imprisonment, absent a departure. . . . U.S.S.G. sec. 7B1.4(b)(2) does not conflict with any statute or the Guidelines themselves. Consequently, Lewis must be resentenced."

U.S. v. Lewis, No. 92-2586 (7th Cir. July 8, 1993) (Kanne, J.).

Note: This appears to be the first circuit to hold that the Chapter Seven policy statements must be followed. Most of the circuits had held, prior to *Stinson*, that Chapter Seven must be considered but is not binding. See *Outline* generally at VII.

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Mergerson, No. 92-1179 (5th Cir. July 12, 1993) (King, J.) (Remanded: For defendant convicted of conspir-acy to distribute heroin, it was error to use amounts he negotiated to sell to find him responsible for over one kilogram of heroin and thus subject to the statutory minimum term under 21 U.S.C. § 841(b)(1)(A)(i). Although negoti-ated amounts are used under the Guidelines, see § 2D1.1, comment. (n.12), "§ 841(b)(1)(A)(i) requires that drug quantities actually be possessed with the intent to distribute—rather than merely being negotiated—[and] the district court's findings for purposes of guidelines sentencing are in large part inapplicable to the court's separate findings pursuant to § 841(b)(1)(A)(i)." Therefore, "the district court had to find . . . that Mergerson actually possessed or conspired . . . to actually possess over a kilogram of heroin during the conspiracy . . . . Mere proof of the amounts 'negotiated' with the undercover agents . . . would not count toward the quan-tity of heroin applicable to the conspiracy count.").

See *Outline* at II.A.3 and B.4.a.

Departures

SUBSTANTIAL ASSISTANCE

Third Circuit holds government may not deny § 5K1.1 motion to penalize defendant for exercising right to trial. The government offered to move for a substantial assistance departure if defendant pled guilty to mail fraud and money laundering charges. Defendant refused to plead to money laundering because he believed the statute did not apply to his conduct. The government responded by "withdraw[ing] the proposed § 5K1.1 plea agreement offer based on [defen-dant's] refusal to plead," and added that it also had "serious reservations" about defendant's truthfulness, which could al-so preclude a § 5K1.1 motion. Defendant was convicted on all counts and no § 5K1.1 motion was made. Defendant claimed the district court could depart under *Wade v. U.S.*, 112 S. Ct. 1840 (1992), because the government had an unconstitutional motive for denying the motion—to penalize him for going to trial. He also claimed that his assistance was equal to or greater than that of two defendants who pled guilty and received departures. The district court denied defendant's request, stating that *Wade* did not prohibit the government's action.

The appellate court remanded: "The Court in *Wade* stated that a district court may grant relief to a defendant if the prosecutor has 'an unconstitutional motive' for withholding a § 5K1.1 motion. . . . [I]t is an elementary violation of due process for a prosecutor to engage in conduct detrimental to a criminal defendant for the vindictive purpose of penalizing the defendant for exercising his constitutional right to a trial."

On remand, defendant can attempt to prove prosecutorial vindictiveness. He is not entitled to a presumption of vindictiveness, however, "because the government has proffered legitimate reasons . . . for its refusal to file a 5K1.1 motion," namely, that defendant's assistance was not, in fact, substantial. Thus, defendant "must prove actual vindictiveness in order to prevail. . . . [H]e must show that the prosecutor withheld a 5K1.1 motion solely to penalize him for exercising his right to trial," and this requires showing "that the government's stated justifications . . . are pretextual."

U.S. v. Paramo, No. 92-1861 (3d Cir. July 7, 1993) (Cowen, J.).

See *Outline* at VI.F.1.b.iii.

Fifth Circuit remands refusal to file § 5K1.1 motion because "significant ambiguities" in the plea agreement require a determination of the intent of the parties. Defendant entered into a plea agreement with the government. At defendant's rearraignment, the government told the district

court "that it is implicit although not spelled out in the agreement that if Mr. Hernandez should provide substantial assistance to the Government, . . . that the Government may make a motion for downward departure at sentencing." Defendant provided information, but the government claimed the assistance was insubstantial and did not file a motion. Defendant claimed that he provided the government with all the information it requested, but the government did not follow up on it and did not give him an opportunity to provide more assistance. Defendant was sentenced to the statutory minimum after refusing the chance to withdraw his plea.

The appellate court remanded, holding that the district court must determine whether the government's conduct was consistent with the parties' reasonable understanding of the plea agreement, which in this case involves "the parties' interpretation of what might constitute substantial assistance." Here, "it is unclear from the record what more Hernandez could have provided—or, more to the point, what more the government could possibly have contemplated that he would provide—in order to earn a motion for downward departure." The Fifth Circuit has held that when a defendant accepted a plea agreement in reliance on government representations "and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obliged to move for a downward departure." *See U.S. v. Melton,* 930 F.2d 1096, 1098–99 (5th Cir. 1991) [4*GSU* #5].

As to whether the government's use of "may" instead of "shall" move for departure gave it greater discretion, the court stated: "We find it difficult if not impossible to believe that any defendant who hopes to receive a [§ 5K1.1 motion] would knowingly enter into a plea agreement in which the government retains unfettered discretion to make or not to make that motion, even if the defendant should indisputably provide substantial assistance. On remand . . . , the government should not be heard to make the legalistic argument that merely by using the word 'may' the government is free to exercise the prosecutor's discretion whether to make the motion . . . . Frankly, we are incredulous that any defendant would consciously make such an obviously bad deal absent some extremely compelling need to plea rather than stand trial."

U.S. v. Hernandez, No. 92-7485 (5th Cir. July 7, 1993) (Weiner, J.).

See *Outline* at VI.F.1.b.ii.

U.S. v. Dixon, No. 92-5780 (4th Cir. July 2, 1993) (Hall, J.) (Remanded: The government breached the plea agreement by not making a § 5K1.1 motion. The agreement stated that if defendant's "cooperation is deemed by the Government as providing substantial assistance in the investigation or prosecution of another person," the government would make the mo-tion. The government "repeatedly conceded" defendant had, in fact, substantially assisted an investigation, but wanted to withhold the motion until defendant assisted in a future trial. Noting that the agreement provided for assistance in the investigation *or* prosecution of another, the appellate court held that "the government has no right to insist on assistance in both investigation and prosecution . . . . Dixon's providing substantial assistance in the investigation of another person has already triggered the government's duty under the plea agreement . . . . Dixon is entitled to specific performance.").

See *Outline* at VI.F.1.b.ii.

U.S. v. Beckett, No. 92-5091 (5th Cir. July 7, 1993) (DeMoss, J.) (Remanded: Although the government specified it was moving under § 5K1.1 only and not for a departure from the statutory minimum under 18 U.S.C. § 3553(e), the district court had discretion to depart below the statutory minimum. "[O]nce the motion is filed, the judge has the authority to make a downward departure from any or all counts, without regard to any statutorily mandated minimum sentence. We see nothing in these provisions that causes us to believe that Congress intended to permit the government to limit the scope of the court's sentencing authority by choosing to package its substantial assistance representation in a 5K1.1 motion rather than a 3553(e) motion.").

See *Outline* at VI.F.3.

Adjustments

Acceptance of Responsibility

U.S. v. Clemons, No. 92-6285 (6th Cir. July 19, 1993) (Milburn, J.) (Affirmed: Adopting the reasoning of *U.S. v. Frazier,* 971 F.2d 1076, 1084 (4th Cir. 1992), the appellate court held that "conditioning the acceptance of responsibility reduction on a defendant's waiver of his Fifth Amendment privilege against self-incrimination does not penalize the defendant for assertion of his right against self incrimination in violation of the Fifth Amendment." Thus, it was proper to deny the § 3E1.1 reduction to a defendant who accepted responsibility for the offense of conviction but refused to admit to related conduct. The court noted, however, that the 1992 amendments to § 3E1.1 and Application Note 1(a), which did not apply to defendant, "'would appear to preclude the Fifth Amendment issue from arising in the future . . . .' *U.S. v. Hicks,* 978 F.2d 722, 726 (D.C. Cir. 1992)."). *See also U.S. v. March,* No. 92-3343 (10th Cir. July 9, 1993) (Logan, J.) (Affirmed: § 3E1.1 reduction properly denied to defendant who followed advice of counsel and refused to discuss circumstances of offense with probation officer preparing presentence report, claiming he might incriminate himself and destroy basis for appeal.). *But see U.S. v. LaPierre,* No. 92-10321 (9th Cir. July 12, 1993) (Norris, J.) (Remanded: District court may not deny § 3E1.1 reduction because defendant claimed privilege against self-incrimination and refused to discuss facts with probation officer and planned to appeal—exercise of constitutional rights may not be weighed against defendant.).

See *Outline* at III.E.2 and 3.

Role in the Offense

U.S. v. Webster, No. 90-50699 (9th Cir. June 11, 1993) (per curiam) (Remanded: District court should consider whether defendant qualifies for minor participant adjustment—based on all relevant conduct—for his role as a courier. However, downward departure may not be considered under *U.S. v. Valdez-Gonzalez,* 957 F.2d 643 (9th Cir. 1992), which held that departure for a drug courier may be appropriate if the courier was the only "participant" in the offense of convic-tion. The Nov. 1990 amendment to § 3B's Introductory Com-mentary, which states that relevant conduct should be used for role in offense adjustments, effectively overturned the reasoning of *Valdez-Gonzalez,* which focused on the fact that the earlier version of § 3B1.2 did not adequately account for a defendant's role in relevant conduct.).

See *Outline* at III.B.5.